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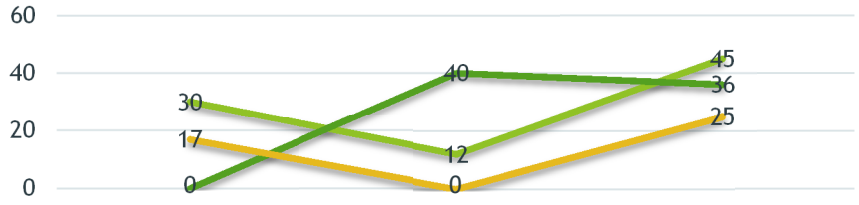

Energy

In this edition of Legal Pulse we analyze a recent court decision regarding photovoltaic plants and the feed-in tariff awarded thereto

PV Plants - Feed-in Tariff: Constitutional Court states the *Spalma Incentivi* hair-cut is lawful

The Italian Constitutional Court decision n. 16/2017 was published on 24 January 2017.

The decision: the Constitutional Court (hereinafter also the **Court**) stated that the challenged provisions introduced by the Law Decree 91/2014 (so-called *Spalma-Incentivi*, the **Law Decree**) which introduced several forms of hair-cut on the feed in tariff already granted to PV plants were not against the Constitutional principles.

The hair-cuts: in 2014 the Law Decree forced the producers of energy from PV plants to choose - by November 2014 - among 3 options:

(i) A reduction of the feed-in tariff awarded, between 6% and 8%, depending on the nominal power size of the plant; or

(ii) A feed-in tariff reduction in exchange for an extension of the payment period - from 20 to 24 years; the reduction varies between 17% and 25%, depending on the residual life of the plant; or

(iii) A feed-in tariff reduction - during a first period - balanced by an increased feed-in tariff for an equal amount after year 2020; the tariff reduction/increase are calculated in order to ensure a saving of at least Euro 600 million/year over the period 2015-2019, should all parties having title to this option join same.

The Court arguments: The parties involved - investors and developers among the others - had raised a challenge of the constitutionality of certain provisions of the Law Decree. They had alleged to have suffered a damage for the violation of their lawful expectation (*legittimo affidamento*) that the tariff previously awarded to their plants would remain unvaried for the period initially granted. The Court, instead, stated - also recalling its previous case-law - that the legislator may rule changes, which may also be unfavorable to long-term relationships (*rapporti di durata*) notwithstanding these have generated "perfected" rights (*diritti soggettivi perfetti*), provided that the new ruling is not irrational or unreasonable in doing so, since this would frustrate the principle of the protection of the private parties' trust in the legal system (*sicurezza giuridica*).

With respect to the case under scrutiny, the Court remarked that the *ratio* of the Law Decree was not to unreasonably, arbitrarily or unpredictably impact on the pre-existing legal relationships in a way to endanger the aforesaid principle.

Rather, continued the Court, the law maker in 2014 operated in an economic environment where it had to cope with – on the one side – (i) a significant growth of the profitability deriving to producers from the incentive tariffs, when confronted with comparable situations in other European Countries and (ii) the decrease of the production costs caused by the fast improvement of the industry's technological development, while – on the other side - the economic burden for such incentives was being born by the end consumers of energy, mainly small-mid size companies. The new law ruling was meant, then, to favor a better sustainability of the politics supporting renewable energies and to spread evenly the tariff burden among the different c ategories of power consumers. This was exactly the aim of the 2014 law maker which acted in order to pursue the public interest, aimed at finding an equitable balance between diverging interests.

The Court, also, ran a thorough analysis of the several Ministerial Decrees that have enacted the policies supporting the PV industry, thus evidencing how many law provisions contained already elements that might have suggested the possibility that some type of rulings would be passed in order to reduce the energy tariff burdens. Such elements then grounded the Court's reasoning that the new ruling cannot be challenged under the profile that it came as a ruling that was not foreseeable. Rather, argues the Court, the incentives' reduction was somehow "announced" and was formulated with a view at safeguarding the investments' sustainability.

The Law Decree, continued the Court, compensates the incentive tariff reductions with other measures protecting the investments made: such as those provided under Article 26, contemplating the possibility to enter into new loans for an amount equal to the balance of the current incentive and the incentive resulting after the remodulation.

Final Comments: Does the Court's decision constitute "the end" to this long debated matter? We do not believe so, due to the existence of bi-lateral international treaties which trigger the possibility for foreign investors to resort to the procedures run by the International Centre for Settlement of Investments Disputes (ICSID). ICSID is "an independent, depoliticized and effective dispute-settlement institution" (..) whose "availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process" (ICSID web home-page). It seems that the word "end" to this matter is not yet written.

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We are at your disposal for further information on the above legal update

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